Consolidated Nos. 09-1454 and 09-1478

IN THE SUPREME COURT OF THE UNITED STATES

JAMES ALFORD, Deschutes County Deputy Sheriff, Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor and K.G., a minor, Respondents

BOB CAMRETA, Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor and K.G., a minor, Respondents

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Amicus Curiae Liberty Counsel in Support of Respondents

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the family. Founded in 1989 by Anita and Mathew Staver, who also serves as the Dean of Liberty University School of Law, Liberty Counsel has offices in Florida, Virginia, Texas and Washington, D.C., and has hundreds of affiliate attorneys all across the nation. A significant part of Liberty Counsel's work has involved defending families against government infringement and intrusions upon fundamental parental rights. Specifically, Liberty Counsel has represented parents and children who have been subjected to searches and seizures that violate both the Fourth Amendment and fundamental parental rights. Liberty Counsel represented parents and their children who were subjected to searches on

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amicus curiae* made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of Amicus Briefs, and such consents are on file with this Court.

private school property, without notice and consent, in *Michael C. v. Gresbach*, 526 F.3d 1008 (7th Cir. 2008). In *Michael C.*, the court found that the parents and children had a legitimate expectation of privacy at the private school so that the searches of the children's bodies to investigate child abuse were presumptively unreasonable and that no exception to the warrant requirement was applicable. *Id.* at 1015-1016.

This case presents a similar clash between parental rights and the Fourth Amendment that threatens the sanctity of the family. Liberty Counsel's extensive background in issues surrounding parental rights has created a wealth of knowledge regarding the issues. Liberty Counsel believes its perspective on these issues can be of assistance in this Court's analysis. Liberty Counsel respectfully submits this Amicus Curiae Brief to provide this Court with information and arguments that may be of assistance in analyzing the constitutional issues raised by this case.

SUMMARY OF ARGUMENT

Most glaringly apparent, yet absent from Petitioners' presentation to this Court, is Petitioners' disregard of, disrespect for and interference with what this Court has described as "perhaps the oldest of the fundamental

liberty interests," *i.e.*, parents' interests in the care, custody and upbringing of their children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). As the Ninth Circuit recognized, "parents have an exceedingly strong interest in directing the upbringing of their children, as well as in protecting both themselves and their children from the embarrassment and social stigmatization attached to child abuse investigations," and those rights were violated by Petitioners' actions. *Greene v. Camreta*, 588 F.3d 1011, 1015-1016 (9th Cir. 2009). Petitioners' failure to address those interests in their presentations to this Court does not make them any less critical to this Court's analysis.

Neither does Petitioners' use of a school office instead of the family home change the need to respect parental rights and Fourth Amendment rights when interrogating young children for purposes of potential criminal investigations. *Calabretta v. Floyd,* 189 F.3d 808, 820 (9th Cir. 1999). Petitioners attempted to circumvent the standard established in *Calabretta* by interviewing S.G. at school and then relying on the diminished expectation of privacy of public school students described by this Court in *New Jersey v. T.L.O.*, 469 U.S. 325, 340-341 (1985) to justify their actions. Conspicuously absent from Petitioners' analysis, however, is the fact that the lower

expectation of privacy has been accorded to school administrators only in the context of school discipline standards, not to all interrogations that happen to occur on school property. Consequently, *T.L.O.* does not provide Petitioners with a shield against complying with the Fourth Amendment requirements put in place in *Calabretta*.

Neither does it exempt Petitioners from complying with the statutory protections put in place by Congress in the Keeping Children and Families Safe Act of 2003. Congress re-emphasized the importance of protecting Fourth Amendment rights during child abuse investigations, and Petitioners' actions circumvent those standards in a way that threatens to disrupt family security.

Petitioners' actions illustrate the need for a stringent evidentiary standard for conducting child abuse investigations. The important state goal of preventing and responding to child abuse allegations must be balanced with the parents' and children's rights under the Fourth Amendment in a way that will ensure that the fundamental constitutional rights are respected and protected. State actors should have to present clear and convincing evidence before invading family privacy in the way Petitioners did here.

These issues should be thoroughly addressed and analyzed by this Court. They are critical to this Court's analysis of Respondents' constitutional rights, and to the precedent that will be set by this Court's decision.

LEGAL ARGUMENT

I. PETITIONERS VIOLATED RESPONDENTS' FUNDAMENTAL LIBERTY INTERESTS IN THE INTEGRITY OF THEIR FAMILY WHEN THEY SEIZED S.G. AND INTERROGATED HER WITHOUT PARENTAL NOTICE OR CONSENT.

For more than 85 years, this Court has recognized that the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests protected by the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925). The child is not merely a creature of the State whose care can be doled out at the whim of a legislature, administrative agency or court. *Meyer*, 262 U.S. at 399-400; *Pierce*, 268 U.S. at 535; *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). Instead, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include

preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). "And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." *Id.*

The fundamental interest in child-rearing pre-dates the founding of this country and the Bill of Rights. *Smith v. Organization of Foster Families For Equality and Reform*, 431 U.S. 816, 845 (1977) (citing *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)). "[T]he liberty interest in family privacy has as its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in "this Nation's history and tradition." *Smith*, 431 U.S. at 845. That is why "the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citing *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

Even when, as is true here, there are allegations that one parent might have mistreated the children, the underlying liberty

interest, and the presumption that parents act in the best interest of their children, does not evaporate, and the state cannot seek to tear apart the family unit without giving due respect to both parents'–and the children's–liberty interests. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Wallis v. Spencer*, 202 F.3d 1126, 1142 (9th Cir. 2000). That is particularly true here, where there were no allegations against Sarah G., and therefore no justification for interfering with her rights vis-à-vis her children. *Wallis*, 202 F.3d at 1142 n.14. "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Parham v. J.R.*, 442 U.S. 584, 602 (1979). "More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Id.* "That some parents 'may at times be acting against the interests of their children' creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests." *Id.* at 602-603. Petitioners could not disregard Sarah G's parental rights and deny her the right to be notified of, consent to and participate in the interrogation of her daughter merely because there were unproven

allegations made about the children's father. Petitioners further disregarded Sarah G.'s rights when they failed to even address the issue in their presentation to this Court.

Petitioners' disregard for Respondents' familial rights is not trivial. "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (citing *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)). That explains the "historic respect–indeed, sanctity would not be too strong a term–traditionally accorded to the relationships that develop within the unitary family." *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989). "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 123-124. Absent allegations (and perhaps proof) that Sarah G. posed a danger to her children or was otherwise unfit, Petitioners could not intrude upon the sanctity of the family either directly by interrogating the children at home, or surreptitiously by seizing S.G. and interrogating her at school without

even bothering to notify Sarah G. *Wallis,* 202 F.3d at 1142 n.14, *See also, Troxel,* 530 U.S. at 68-69 ("[S]o long as a parent adequately cares for his or her children (*i.e.,* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.").

Petitioners' failure to address Respondents' familial rights does not render those rights and Petitioners' interference with those rights non-existent. This Court should not ignore the significant intrusions into the sanctity of the family unit, but should analyze Petitioners' actions through the lens of the fundamental rights accorded to Sarah G. and her children.

II. THE DIMINISHED EXPECTATION OF PRIVACY ACCORDED PUBLIC SCHOOL STUDENTS SUBJECTED TO SEARCHES BY SCHOOL OFFICIALS IS INAPPLICABLE TO THIS NON-SCHOOL RELATED INTERROGATION THAT HAPPENED TO OCCUR ON SCHOOL PROPERTY.

The mere fact that Petitioners chose a school office as the venue for their interrogation

of S.G. does not bring it within this Court's precedents that have recognized a lowered expectation of privacy for public school students in certain circumstances. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Bd. of Educ. of Indep. School Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002). In those cases, this Court explicitly distinguished school officials conducting searches pursuant to their duties to maintain order and discipline, in which the lowered expectation is appropriate, from law enforcement searches and seizures outside of the academic context, in which it is not. Petitioners' actions constitute the latter category which must comport with the Fourth Amendment standards required for investigations conducted in the family home.

A. *T.L.O.* Is Inapplicable Here Because This Was Not A Search Carried Out By School Authorities In Furtherance Of The Need To Maintain Discipline In The Schools.

In *T.L.O.* this Court held that in the context of in-school searches by school officials exercising their duty to maintain order, the Fourth Amendment does not require a warrant or probable cause. *T.L.O.*, 469 U.S. at 341. This

Court upheld a school officials' search of a student's purse for cigarettes and marijuana on the basis of individualized suspicion that she had violated school rules, *i.e.*, that she had been smoking in the lavatory. *Id.* at 346-347. The *T.L.O.* analysis is instructive for demonstrating why it cannot be used to justify Petitioners' actions here. *Id.* at 340-341.

The Court discussed the need to strike a balance between the student's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place. *Id.* at 340. School officials' need for and duty to maintain decorum and discipline requires some easing of the restrictions normally placed upon public authorities under the Fourth Amendment. *Id.* These "special needs" make the warrant and probable cause requirements impracticable in the public school context because they would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools." *Id.* at 340-341. The Court explicitly limited its holding to school officials exercising their duty to maintain order. *Id.* at 342.

> We here consider only searches carried out by school authorities acting alone and on their own

> authority. *This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question.*

Id. at 342 n.7. (emphasis added) (citing *Picha v. Wielgos*, 410 F. Supp. 1214, 1219-1221 (N.D. Ill. 1976) (holding that students in public schools were not relieved of the protection of the Fourth Amendment except to the extent that a compelling state interest in the maintenance of school activities, particularly discipline, required). By its explicit terms, therefore, *T.L.O.* is inapplicable to this interrogation which was not conducted by school officials acting on their own authority in furtherance of their duty to maintain discipline. Petitioners are not school administrators, and they are not investigating a possible violation of school rules. Petitioners are law enforcement and county welfare officials investigating allegations of child abuse. Their choice to use a room at the school instead of the student's home did not place them under the protection of *T.L.O.*'s lowered standards.

B. The *Vernonia* And *Pottawatomie County* Cases Are Inapplicable Here Because This Search Was Not Carried Out By School Authorities In Furtherance Of Their Custodial Responsibility Over Students.

Similarly, Petitioners cannot rely upon the relaxed Fourth Amendment standards approved in *Vernonia*, 515 U.S. at 656, to justify their actions. In *Vernonia*, this Court found that school policy requiring suspicionless drug testing for athletes did not violate students' Fourth Amendment rights. *Id.* at 664-665. "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Id.* at 656. "For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated

against various diseases." *Id.* Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy. *Id.* at 657. As it did in *T.L.O.*, this Court carefully limited its holding. *Id.* at 665. "We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts." *Id.* "The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care." *Id.*

That element was also critical in *Pottawatomie County*, where this Court upheld a school policy requiring drug testing for students involved in non-athletic extracurricular activities. *Pottawatomie County*, 536 U.S. at 829-830. Parents challenging the policy tried to distinguish it from the policy upheld in *Vernonia* because the *Pottawatomie County* policy involved non-athletic programs. *Id.* The Court rejected that distinction, holding that athletics versus non-athletics was not the critical factor. *Id.* at 831. What was critical was the fact that the policy was implemented as part of the school's

custodial responsibility and authority over students. *Id.* at 831. The Court pointed out that students in extracurricular activities voluntarily subjected themselves to many of the same intrusions as did athletes and like athletes were required to comply with regulations and restrictions not imposed on the student body as a whole. *Id.* at 832. Therefore, they had the same lowered expectation of privacy as did student athletes, and could be subjected to the same suspicion-less, warrant-less drug testing as were athletes, but only for school-related discipline and safety purposes. *Id.*

Another significant factor in *Pottawatomie County* and *Vernonia* was the limited use of the information gathered during the drug testing. *Id.* at 833; *Vernonia*, 515 U.S. at 658. The test results were not turned over to law enforcement nor even used as a basis for disciplinary proceedings, but were used only to protect students from injury and discourage drug use by withholding the privilege of participating in extracurricular activities. *Pottawatomie County* 536 U.S. at 833; *Vernonia*, 515 U.S. at 658. In this case, by contrast, the information was not only turned over to, but was actually gathered by law enforcement officials for use in a criminal investigation. In addition, the interrogation

was not conducted by school officials acting in their capacities as guardians of the academic environment, but by county officials seeking to avoid the restrictions attendant to an interrogation in the family home.

Moving the seizure and interrogation of S.G. from the family's residence to a school office did not shield Petitioners from the requirements of the Fourth Amendment. A mere change in locale did not transform the criminal investigation of alleged child abuse by a county child protection officer and deputy sheriff into a school discipline investigation by a principal or superintendent. The lessened expectation of privacy accorded to students in the latter circumstances cannot be applied to relieve Petitioners of their obligations under the Fourth Amendment.

III. GOVERNMENT AGENTS SHOULD NOT BE PERMITTED TO CIRCUMVENT FOURTH AMENDMENT STANDARDS FOR IN-HOME INTERROGATIONS OF CHILDREN BY MOVING THE INTERROGATIONS TO A PUBLIC SCHOOL.

The courts and Congress have made it clear that social welfare workers and law enforcement must respect Fourth Amendment

rights when they engage in child abuse investigations. Absent consent, a warrant or proof of exigent circumstances, child welfare workers and law enforcement cannot unilaterally seize a child and interrogate or examine her, regardless of whether they are in the family home or, as in this case, a school.

A. With The Protective Shield Of *T.L.O.*, *Vernonia* And *Pottawatomie County* Unavailable, Petitioners Were Required To Follow Precedents Establishing That Fourth Amendment Restrictions Must Be Followed During Child Abuse Investigations.

As the Ninth Circuit correctly held, *T.L.O.* does not impose a blanket suspension of Fourth Amendment requirements anytime a child is involved. *Calabretta v. Floyd,* 189 F.3d 808, 816 (9th Cir. 1999). Nor does it create a universal exception to the Fourth Amendment every time a government official enters upon school property, as Petitioners claim. *T.L.O.*, 469 U.S. at 342 n.7. Rather than excusing Petitioners from Fourth Amendment safeguards, *T.L.O.*, *Vernonia* and *Pottawatomie County* point to why Petitioners were not exempt from the Fourth Amendment merely

because they conducted their interrogation at school. In all three cases, this Court emphasized that the exemption from a warrant and probable cause extended *only* to *school officials* conducting investigations *as part of their duty to maintain order and discipline.* *T.L.O.*, 469 U.S. at 342; *Pottawatomie County* 536 U.S. at 833; *Vernonia*, 515 U.S. at 658. Importantly, this Court also emphasized that the exemptions were acceptable because there was **no** law enforcement involvement, either in the investigations or in analyzing the results. *T.L.O.*, 469 U.S. at 342; *Pottawatomie County* 536 U.S. at 833; *Vernonia*, 515 U.S. at 658. Law enforcement is at the heart of the investigation in this case, making the exemptions granted in *T.L.O.*, *Veronina* and *Pottawatomie County* wholly inapplicable, regardless of the fact that the investigation took place at school.

With the shield of the school venue rendered ineffective, Petitioners are faced with the binding precedent of *Calabretta* and subsequent cases which have firmly established that social workers and police officers violate the Fourth Amendment when they invade the sanctity of the family and interrogate children without the consent of their parents and absent exigent circumstances, regardless of whether they are on school property. *Calabretta*, 189 F.3d at 820; *Wallis*, 202 F.3d at 1142; *Rogers v.*

County of San Joaquin, 487 F.3d 1288, 1297 (9th Cir. 2007); *Doe v. Heck*, 327 F.3d 492, 512-513 (7th Cir. 2003).

In *Calabretta*, the Ninth Circuit held that a social worker and police officer violated a mother and child's Fourth Amendment rights when they unlawfully entered the family home without a warrant and forced the mother to assist in a strip search of her child. 189 F.3d at 820. "An unlawful entry or search of a home does not end when the government officials walk across the threshold. It continues as they impose their will on the residents of the home in which they have no right to be." *Id.* "An essential aspect of the privacy of the home is the parent's and the child's interest in the privacy of their relationship with each other." *Id.*

That interest was egregiously violated in this case when the Petitioners decided to bypass the home entirely–and thereby deprive Sarah G. and S.G. of the ability to even assert their Fourth Amendment rights–and instead go to S.G.'s school to seize and interrogate her without Sarah G.'s knowledge or consent. As the Ninth Circuit wrote, the government's interest in the welfare of children "embraces not only protecting children from physical abuse, but also protecting children's interest in

the privacy and dignity of their homes and in the lawfully exercised authority of their parents." *Id.* Respondents had no opportunity to even assert those rights, let alone exercise them, because of Petitioners' decision to circumvent *Calabretta* by showing up at S.G.'s school. Petitioners should not be permitted to manipulate the circumstances in order to avoid complying with the Fourth Amendment.

The fact that Petitioners were investigating allegations against *one* of the parents does not justify their deprivation of the *other* parent's or the children's rights. *Wallis*, 202 F.3d at 1142.

> We note that the claims of each family member must be assessed separately. Here, nothing in the record before us suggests that Becky Wallis was anything other than a fit and loving mother. As the Third Circuit recently held, a state has no interest whatever in protecting children from parents unless it has some reasonable evidence that the parent is unfit and the child is in imminent danger. *Croft [v. Westmoreland County Children and Youth Services]*, 103 F.3d [1123] at 1125

> [(3d Cir. 1997)]. *The government may not, consistent with the Constitution, interpose itself between a fit parent and her children simply because of the conduct–real or imagined–of the other parent.*

Id. at 1142 n.14 (emphasis added). The *Wallis* court's discussion of the nature and scope of parents' and children's rights during child abuse investigations is instructive in illustrating the constitutional problems with Petitioners' attempt to evade the Fourth Amendment by interrogating S.G. at school. *Id.* at 1142. "[P]arents have a right arising from the liberty interest in family association to be with their children while they are receiving medical attention (or to be in a waiting room or other nearby area if there is a valid reason for excluding them while all or a part of the medical procedure is being conducted)." *Id.* "Likewise, children have a corresponding right to the love, comfort, and reassurance of their parents while they are undergoing medical procedures, including examinations–particularly those, such as here, that are invasive or upsetting." *Id.* "The interest in family association is particularly compelling at such times, in part because of the possibility that a need to make medical decisions will

arise, and in part because of the family's right to be together during such difficult and often traumatic events." *Id.*

In *Heck*, the Seventh Circuit found that county child welfare workers had violated the Fourth Amendment when they interrogated a student regarding corporal punishment on a private school campus without a warrant or consent. *Heck*, 327 F.3d at 515. The court found that the on-campus search and seizure was presumptively unreasonable, but would also be found unconstitutional if the usual Fourth Amendment test for reasonableness would apply. *Id.* "In conducting this test, we do not consider the government's interest in the abstract (*i.e.*, the state's general interest in protecting children from abuse), but instead evaluate whether, under the circumstances of a particular case, the government officials in question had "some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Id.* (citing *Wallis*, 202 F.3d at 1138). There was no such evidence in *Heck* and no such evidence in this case, making Petitioners' actions here unconstitutional.

In *Wallis*, the court was specifically addressing invasive physical examinations instead of the interrogation involved in this

case, but the relative rights of the non-accused parent and the child are no less relevant here than in *Wallis*. As one scholar said regarding the child abuse investigation process:

> Indeed, despite the authorities' best intentions, the process can be harmful in two related ways. First, the investigations undermine the fundamental values of privacy, dignity, personal security, and mobility that are protected by the Fourth Amendment. It is critical in this regard that the Fourth Amendment uniquely has been interpreted to recognize the child's own individual interest in these values, by guarding her right also to be free from unreasonable searches and seizures both inside and outside the family home.
>
> Second, as the introductory illustration intimates, depending upon the child and the nature of the investigation, the process can cause emotional and psychological damage ranging from temporary

> discomfort to significant long-term harm.[2]

S.G., who was only nine, was removed from class, placed in a room with a social worker and deputy sheriff and interrogated for two hours regarding intimate details of her family life. *Greene v. Camreta*, 588 F.3d at 1017. She was facing difficult and traumatic circumstances that could cause long-term emotional and psychological damage. S.G. testified that she was scared when she was left alone with Petitioners. *Id.* She had no less right to the love, comfort and reassurance of her mother than she would have if she were undergoing an invasive physical examination. Likewise, Sarah G. had a right to be present when her daughter was being subjected to a situation that could cause her emotional and psychological harm. Sarah G. was not the subject of Petitioners' investigation and therefore should not have been deprived of her right to provide care and comfort to her children.

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[2] Dorianne Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM & MARY L. REV. 413, 418-419 (2005).

Undoubtedly, child abuse and neglect are serious problems and protecting the victims of such abuse is an important goal. *Rogers*, 487 F.3d at 1297. "However, the rights of families to be free from governmental interference and arbitrary state action are also important." *Id.* "Thus, we must balance, on the one hand, the need to protect children from abuse and neglect and, on the other, the preservation of the essential privacy and liberty interests that families are guaranteed under both the Fourth and Fourteenth Amendments of our Constitution." *Id.* That balancing requires that government authorities conform to the requirements of the Fourth Amendment before invading familial privacy, whether in the home or at the child's school. *See id.*[3]

B. Petitioners Should Not Be Permitted To Circumvent The Statutory Protections Congress Put In Place To Protect Families' Fourth Amendment Rights During Child Abuse Investigations.

Petitioners' decision to bypass the family residence and interrogate S.G. without notifying Sarah G. or obtaining her consent

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[3] *See also,* Coleman, at 418-419.

also subverts protections Congress put in place to prevent just this kind of situation. The Keeping Children and Families Safe Act of 2003, S. 342, Pub. L. No. 108-36, 117 Stat. 800, added two subsections to 42 U.S.C. §5106a aimed at protecting the Fourth Amendment rights of parents and children during child abuse investigations. The subsections require that states enact:

> (xviii) provisions and procedures to require that a representative of the child protective services agency shall, at the initial time of contact with the individual subject to a child abuse and neglect investigation, advise the individual of the complaints or allegations made against the individual, in a manner that is consistent with laws protecting the rights of the informant;
>
> (xix) provisions addressing the training of representatives of the child protective services system regarding the legal duties of the representatives, which may consist of various methods of informing such representatives of such duties, in order to protect the legal rights

> and safety of children and families from the initial time of contact during investigation through treatment.

42 U.S.C. §§5106a (xviii), (xix). Congress explained that it enacted those provisions precisely to help protect people like Respondents who were being subjected to warrant-less searches and seizures during child abuse investigations:

> The committee has also included a requirement for training of CPS workers on their legal responsibilities in order to protect the constitutional and statutory rights of children and families.
>
> While the committee is strongly committed to the main mission of the child protective services system–to ensure that child safety and the best interests of the child are protected, the committee believes it is important for child protective services personnel to understand and respect fourth amendment limitations on their right to enter a home when investigating an allegation without a court order.

> The committee firmly believes that individuals being investigated for alleged child maltreatment should be informed of the specific allegations made against them. S. 342 addresses this issue by requiring States to have policies and procedures in place to require child protection workers, at the initial time of contact, to advise individuals who are subject to a child abuse and neglect investigation of the complaints or allegations made against them. The committee recognizes that it is a basic right for all citizens to be informed of what crime they are being accused of at the time they are being asked for an interview or entry into their home.

S. REP. NO. 108-12, at 15-16 (2003). Rather than according Respondents' Fourth Amendment rights the respect required by Congress, Petitioners side-stepped the issue by conducting the investigation at S.G.'s school instead of the family home. Petitioners should not be permitted to evade their obligations under the Fourth Amendment by simply changing the venue for their investigations. Respondents' Fourth Amendment rights are

not limited to the confines of their residence, and Petitioners should not be permitted to flout the will of this Court and Congress by doing at a child's school what they cannot do in the home. Fourth Amendment rights should not be subjected to such gamesmanship.

IV. GOVERNMENT AGENTS SHOULD BE REQUIRED TO PRESENT CLEAR AND CONVINCING EVIDENCE OF CAUSE FOR EMERGENCY REMOVAL BEFORE HAVING ACCESS TO CHILDREN WITHOUT NOTICE OR CONSENT OF THEIR PARENTS.

Petitioners' efforts to circumvent the requirements for in-home interrogations by seizing and interrogating S.G. at school demonstrate the need for stringent evidentiary standards for government investigations involving children. When, as is true in this case, a state investigation or proceeding threatens fundamental constitutional rights, the state should have to establish by clear and convincing evidence that there is a countervailing compelling interest that requires the extraordinary measures. *Santosky v. Kramer,* 455 U.S. 745, 756 (1982). "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual

liberty." *Id.* (citing *Addington v. Texas*, 441 U.S. 418, 425 (1979)). "This Court has mandated an intermediate standard of proof–'clear and convincing evidence'–when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Id.* (citing *Addington*, 441 U.S. at 424)). "The Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma.'" *Id.* (citing *Addington*, 441 U.S. at 425)).

In the parental rights context, a "clear and convincing evidence" standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns. *Id.* at 769. "We hold that such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process." *Id.* There was no such balancing of rights in this case. Instead, Petitioners unilaterally elevated their interest in an intrusive, unobstructed interrogation of a nine-year old over the constitutional rights of the child and her mother to gain access to the child based on no more than a double hearsay

suggestion that there might have been some conduct that might indicate abuse. *Greene v. Camreta*, 588 F.3d at 1016-1017. Petitioners' conduct does not reflect the pre-eminent value placed upon individual liberty or the fundamental fairness that this Court found imperative in *Santosky*. This Court should re-emphasize that government agents cannot gain access to children for such investigations without meeting the clear and convincing evidence standard described in *Santosky*, 455 U.S. at 769.

Proceeding, as Petitioners did here, without meeting such standards, obtaining a warrant or consent or adducing proof of exigent circumstances "reflects an unacceptable bias against individual and family privacy."[4] "When all of the relevant interests are carefully evaluated–notwithstanding the almost religious sense of many child advocates to the contrary–there is a strong child-friendly case to be made for requiring valid consent, a real exigency, or a particularized warrant and probable cause before a state conducts a child maltreatment investigation that involves either a home visit or a sequestration and oral or physical examination of a child."[5] "These

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[4] *Id.* at 509.

[5] *Id.* at 532.

traditional procedures best balance the various private interests and public needs at issue in the child welfare context, by assuring that the state can conduct a properly circumscribed investigation when it has proved to a neutral evaluator that a child is probably at risk."[6] Such requirements also preserve the presumption of innocent until proven guilty from the kind of reversal apparent in this case, where Petitioners conducted their investigation under the premise that the father *and mother* were presumed guilty.

Adhering to the traditional Fourth Amendment protections and evidentiary standard described in *Santosky* also protects the children's constitutional rights. "This approach uniquely respects the child's own Fourth Amendment interest in privacy, dignity, personal security, and mobility, by recognizing that, in general, the vitality of these values is intimately and even inextricably linked to the child's sense that she is one with her family. At the same time, it allows for the reality that this unity is sometimes broken from within by abusive or neglectful parents, giving rise to the need for the state to intrude into the circle of

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6 *Id.*

family privacy when a child likely needs to be rescued."[7]

That circle should not be as easily penetrable as it was in this case. "[P]rivacy is essential to securing parental authority and the unity of the family group, and to the sense of dignity and personal security of its individual members especially the children."[8] "The law cannot realign the children's interests away from their parents on the basis of a mere subjective suspicion of maltreatment and also be true to the children's developmental needs or their Fourth Amendment rights."[9] "The fact is, most parents are their children's first, best caretakers, and thus the time-honored presumption that parents act in their best interests is both deserved and necessary to the children's wellbeing."[10]

Of course, "the sovereignty of the family cannot be so impenetrable that it prevents the state from saving children who are at real risk of maltreatment. At the same time, it cannot be so porous as to allow the state to storm the castle to 'save' children who do not need

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7 *Id.* at 532-533.

8 *Id.* at 536.

9 Id. at 536-537.

10 *Id.*

saving."[11] "From the children's perspective, only a compromise conception that reflects appropriate respect for family privacy is just and healthy. The Fourth Amendment's traditional requirements precisely ensconce this conception."[12] This Court should clarify that those requirements must apply to child abuse investigations, whether interrogations take place in the home, at school or at some other location.

CONCLUSION

Government agents investigating potential child abuse within the family should not be permitted to circumvent Fourth Amendment protections by interrogating a nine-year-old at her school without her parent's knowledge or consent. Even if one parent is the subject of the investigation, the rights of the other parent and the child must be respected and protected. This Court should re-emphasize the fundamental importance of family privacy, integrity and the Fourth Amendment by clarifying that the protections accorded to

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11 *Id.* at 537.

12 *Id.*

families in their homes must extend to investigations conducted away from home.

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